

OFFICE OF THE ATTORNEY GENERAL

Official Opinion No. 2010-2

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OFFICIAL OPINION 2010-2

Mr. Bruce A. Hartman, CPA
State Examiner
Indiana State Board of Accounts
302 W. Washington St., Room E418
Indianapolis, Indiana 46204-2769

RE: School Bus Rider Fees

Dear Mr. Hartman:

In your letter requesting this legal opinion, you advised that some Indiana school corporations are planning to charge their students bus rider fees for transportation to and from their respective schools in order to obtain a public education. It is the audit position of the Indiana State Board of Accounts that a school corporation is not authorized to assess, collect, or receipt bus rider fees for the transportation of its students.¹ The school corporations have asserted that the Indiana School Corporation Home Rule Act (hereafter, the Home Rule Act), Ind. Code § 20-26-3 *et seq.*, authorizes the assessment and collection of bus rider fees by the school corporations. The school corporations also have transportation funds established pursuant to Ind. Code § 20-40-6 *et seq.* for which taxes are collected and spent. You raise the following question:

Is a public school corporation authorized to assess and collect a bus rider fee from its students in order for the students to receive transportation to and from their respective schools where they receive a public education?

BRIEF ANSWER

A public school corporation is not authorized to assess and collect a bus rider fee from a student in order for that student to receive transportation to and from the student's school to receive a public education. Such a fee is unconstitutional.

LEGAL ANALYSIS

The Indiana Attorney General addressed a similar issue in *Official Opinion 2001-4* (2001).² At issue in that opinion was the constitutionality of a school health services fee a school corporation assessed its students. The fee was used to fund nursing positions within the school corporation. The Attorney General noted that Indiana's Constitution provides as follows:

. . . [I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general and uniform system of Common Schools, *wherein tuition shall be without charge*, and equally open to all.

Ind. Constitution, Art. 8, § 1 (emphasis added). The issue, then, was whether the assessment of the fee was an unconstitutional charge of "tuition," a term not defined in either the Constitution or in statute. The Home Rule Act was also interposed as justification for the assessment of the fee. The Attorney General acknowledged the Home Rule Act did provide school corporations with considerable authority, but added that there are limits to such power. "A school corporation may exercise any power the school corporation possesses to the extent that the power. . . is not expressly denied by the Constitution of the State of Indiana, by statute, or by rule of the state board [of education][.]" Ind. Code § 20-26-3-4.

Relying upon the definition of "tuition" employed by the Indiana Court of Appeals in *Chandler v. South Bend Community School Corporation*, 312 N.E.2d 915 (Ind. Ct. App. 1974),³ a case involving a constitutional challenge to the statutory requirement that school corporations collect textbook rental fees, the Attorney General found that school health services "are a necessary element of any school's activity, and as such, would fall within the meaning of tuition." *Official Op. 2001-4* at 5. The assessment and collection of such a fee would not be

permissible under the Indiana Constitution. *Id.* at 6.

Subsequent to the Attorney General's Opinion, the Indiana Supreme Court addressed the scope of permissible fees in *Nagy, et al. v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d 481 (Ind. 2006).

In *Nagy*, the school corporation assessed and collected a mandatory \$20 "student services fee" from each student in grades K-12. The fee was deposited in the school corporation's general fund and used to offset the costs of a student services coordinator, nurses, media specialists, alternative education, elementary school counselors, a drama program, a music program, speech and debate programs, academic academies, athletic programs, and a police liaison program. 844 N.E.2d at 492. Students were assessed the fee whether they participated in or benefited from any of these services.

The Supreme Court examined the phrase "wherein tuition shall be without charge" in the context of the history surrounding the drafting of Art. 8, § 1 and its subsequent ratification. They noted that the framers of Indiana's constitution did not provide for a free school system; rather, they provided that "tuition shall be without charge," a distinction that is "subtle. . . , but a significant one that we believe the framers made intentionally." *Id.* at 485.

Rather than completely subsidizing education, which would fall within the meaning of a "free school" system, the framers pursued a more modest, and perhaps less controversial route: a uniform statewide system of public schools that would be supported by taxation.

Id. at 489. Unfortunately, other than arguments concerning the funding of public schools at the constitutional convention, there is nothing that would indicate "what the framers meant by the use of the term 'tuition.'" *Id.* at 490. A dictionary from that period defined "tuition" as superintending the care over a young person, particularly by a tutor or guardian over a pupil or ward; instruction, including the act or business of teaching the various branches of learning; and money paid for instruction. *Id.*, quoting Noah Webster, *An American Dictionary of the English Language* 1181 (Springfield, Mass., Merriam 1854). Although this definition of "tuition" may have been the common understanding of the term by those who framed the Indiana Constitution as well as those who subsequently ratified it, the concept of "tuition" cannot be limited solely to those curricular-related expenses mandated by the legislature. *Id.*

By the express terms of the Constitution, "tuition shall be without charge." Obviously tuition was to be subsidized through public funding sources. But to suppose that all remaining educational expense would be placed on the shoulders of parents whose children were attending public schools loses sight of the entire free school movement debate—a central and key element of which was the public schools would be operated largely at public expense.

Id. at 491. The concept of what constitutes a public education has dramatically changed since 1851. The determination of what is a "public education" in Indiana is within the authority of the General Assembly. Art. 8, § 1 makes this a legislative imperative. "But this imperative leaves to that branch considerable discretion in determining what will and what will not come within the meaning of a public education system." *Id.*

The Indiana General Assembly, consistent with its constitutional mandate, has enacted a body of law intended to provide a general and uniform system of public schools. These enactments also include provisions for revenue and funding sources, as well as curricular requirements and special programs. It has delegated some responsibilities to state agencies, including the State Board of Education. The latter is not only authorized to adopt rules in many of these areas but is also to "[e]stablish the educational goals of the state, developing standards and objectives for local school corporations." *Id.*, citing Ind. Code § 20-19-2-14(1). It is in consideration of these enactments, delegation of authority, and authorized rules that the contours of what will constitute a "public education" is determined. *Id.* at 491-92.

Based on the foregoing, the Supreme Court then fashioned an analytical framework or test to be applied in determining whether a fee or charge is constitutional.

Where the legislature—or through delegation of its authority the State Board—has identified programs, activities, projects, services or curricula that it either mandates or permits school corporations to undertake, the legislature has made a policy decision regarding exactly what qualifies as a part of a uniform system of public education commanded by Article 8, Section 1 and thus what qualifies for funding at public expense. And of course the legislature has the authority to place appropriate conditions or limitations on any such funding. However, *absent specific statutory authority*, fees or charges for what are otherwise public education

cost items cannot be levied directly or indirectly against students or their parents. Only programs, activities, projects, services or curricula that are outside of or expanded upon those identified by the legislature—what we understand to be "extracurricular"—may be assessed, but only against those students who participate in or take advantage of them.

Id. at 492 (emphasis added). The Supreme Court found that the programs and services for which the school corporation was assessing and collecting a fee were already a part of a publicly funded education in Indiana; as such, the fee was unconstitutional.

However, this conclusion does not preclude [the school corporation] from offering programs, services or activities that are outside of or expand upon those deemed by the legislature or State Board as part of a public education. The Indiana Constitution does not prohibit [the school corporation] from charging individual students for their participation in such extracurriculars or for their consumption of such services. However, the mandatory fee [the school corporation] imposed generally on all students, whether the student avails herself of a service or participates in a program or activity or not, becomes a charge for attending a public school and obtaining a public education. Such a charge contravenes the "Common Schools" mandate as the term is used in Article 8, Section 1 and is therefore unconstitutional.

Id. at 493. The *Nagy* decision provides the following analytical framework or test for examining a fee or charge for services by a public school corporation:

1. Is the program, activity, project, service or curricula mandated by the legislature or permitted by the legislature? If so, then "the legislature has made a policy decision regarding exactly what qualifies for funding at public expense." *Id.* at 492.
2. Although the legislature has the authority to place appropriate condition or limitations on funding for such programs, "absent statutory authority, fees or charges for what are otherwise public education cost items cannot be levied directly or indirectly against students or their parents." *Id.*

"[T]his does not preclude [a public school corporation] from offering programs, services or activities that are outside of or expand upon those deemed by the legislature or State Board [of Education] as part of a public education." *Id.* at 493. The Court provided several examples of both mandated and permissive programs or services that would be considered a "part of a public education," including the authorization to establish alternative education programs, Ind. Code § 20-30-8 *et seq.*; encouragement to develop comprehensive plans to improve arts education, including programs in drama and music, Ind. Code § 20-20-24 *et seq.*; and permission to offer speech and debate as part of the language arts area of study, 511 Ind. Admin. Code 6.1-5.1-2. "[W]e have already recognized that 'athletics are an integral part of this constitutionally-mandated process of education.' [*Ind. High School Athletic Assoc. v. Carlberg*, 694 N.E.2d [222] at 229 [statutory citations omitted]]." *Nagy*, 844 N.E.2d at 492-93.

The history of transportation of public school students indicates that this service, mandated in some circumstances and discretionary in others, is a "part of a public education." The transportation of public school students was not discussed during the second constitutional convention (1850-1851). There is little mention of transportation until near the end of the 19th century, when consolidation of public schools became necessary due to small enrollments in some areas resulting in abandonment or discontinuance of the existing public schools. Educational offerings were also expanded during this period. Students could seek transfers to neighboring public schools based on whether the students could be "better accommodated" in the transferee school corporation rather than the transferor school corporation (the school corporation of legal settlement).⁴ At the end of the 19th century, "better accommodation" to support a student transfer was based upon such issues as "[t]he proximity of the schools in the township and city to the residence" of the student; "the kind and character of the roads to each; the means of transportation, if any, to each; [and] the crowded condition of the schools in either of the two school corporations." *Edwards, et al. v. State ex rel. Kisling*, 42 N.E. 525, 527 (Ind. 1895).

In 1901, the legislature refined "proximity" as a reason for transfer, determining that a student could seek a transfer to a neighboring school corporation "if the nearest school to any child entitled to school privileges shall be more than one mile from the residence of such child and there be a school in an adjoining corporation within one-half mile, unless free transportation is provided."⁵ Later, the General Assembly required transportation to be provided and maintained for students whose public schools had been discontinued or abandoned. This transportation would be "for all such pupils as live at a greater distance than two miles, and for all pupils between the ages of six (6) and twelve (12) that live less than two miles and more than one mile from the schools to which they may be transferred as a result of such discontinuance. . . . The expenses necessitated by the carrying into effect the provisions of this act shall be paid from the special school fund."⁶ Later, the legislature required

transportation for all pupils who live more than two (2) miles from their public schools, or, if between the ages of six (6) and twelve (12), live more than one mile from their public schools.⁷ In 1921, the General Assembly required the expense of transportation of public school pupils to be paid out of the special school fund or township fund.⁸ The same law also required transportation for transferred students if they lived more than one and one-half (1 1/2) miles from the public school to which they have been assigned. The law also granted discretion to township trustees to provide transportation for high school students.⁹ This latter requirement was expanded in 1945 to address the transportation of high school students where the township does not maintain a high school.¹⁰

At present, the legislature has granted specific statutory authority for school corporations to collect or assess certain fees or charges, such as textbook rental fees, Ind. Code § 20-26-12-1; participation in latch-key programs, Ind. Code § 20-26-5-2(b); and participation in full-day kindergarten program, P.L.182-2009(ss), Sec. 9.¹¹

With respect to transportation, the State Board has specifically stated that the parents of certain students with disabilities for whom transportation is a "related service" cannot be required to pay fees or be assessed charges for transportation. See 511 Ind. Admin. Code 7-32-79 (defining "related services"); 511 Ind. Admin. Code 7-36-8 ("Transportation"); and 511 Ind. Admin. Code 7-43-1(a), (u). Also see 511 Ind. Admin. Code 7-32-40(a)(1), defining "free appropriate public education" (FAPE) as "special education and related services that . . . are provided at public expense, under public supervision and direction, and at no cost to the parent[.]" A student with a disability who is transferred to a school corporation that is not the student's school corporation of legal settlement in order to receive a FAPE is entitled to transportation at no cost. Ind. Code § 20-35-8-1. Students with disabilities who attend state schools pursuant to their individualized education plans, such as the Indiana School for the Deaf or the Indiana School for the Blind and Visually Impaired, are entitled to transportation provided by or paid for by their school corporations of legal settlement or, in some cases, paid for by the state. Ind. Code § 20-35-8-2.

The General Assembly requires certain school corporations to provide transportation for affected students transferred pursuant to a court order to address racial segregation. See Ind. Code §§ 20-26-11-26, 20-26-11-27.¹²

With regard to transportation services to public school students generally, the General Assembly authorizes the governing body of a school corporation to "provide transportation for students to and from school." Ind. Code § 20-27-5-2. Should a school corporation's governing body elect to provide transportation for its students, the governing body is responsible for obtaining the necessary school buses and school bus drivers. Ind. Code § 20-27-5-3. While Ind. Code § 20-27-9-15 does require the governing body to "account for all funds received for the transportation of students and the transportation of other groups authorized" under Ind. Code § 20-27-9-1 through Ind. Code § 20-27-9-14 inclusive, there is no statutory authority permitting a governing body to assess a school bus rider fee on its own students for transportation to and from school. Ind. Code § 20-27-9 *et seq.* addresses various public and private uses of school buses and authorizes governing bodies to use school buses for these purposes. Public schools must provide transportation and cannot charge a fee where the student is a homeless student. See Ind. Code § 20-27-12-4. The same is true for certain students in foster care. See Ind. Code § 20-50-3-5. A public school corporation that does not have a high school is responsible for the transportation costs of transferring its high school students to a high school in a contiguous public school corporation. Ind. Code § 20-27-11-3. A school corporation that transfers any of its students to another school corporation is authorized to contract with the receiving school corporations for the costs of the transferred students. Ind. Code § 20-27-11-4. With some exceptions not applicable herein, students who reside on state-owned property and attend a public school are to be furnished with transportation in a school bus with the expenses for such transportation paid out of the state general fund. Ind. Code § 20-27-11-2.

Generally, where a parent enrolls the parent's child in a school corporation where the student does not have legal settlement, transportation is the responsibility of the parent. See, e.g., Ind. Code § 20-26-11-30(c), permitting a child to remain in a school corporation where the student had legal settlement for at least two consecutive school years before moving to an adjacent school corporation but requiring the parent to provide for the child's transportation to school.

School corporations are required to establish a School Transportation Fund. Ind. Code § 20-40-6-4. The School Transportation Fund "is the exclusive fund to be used by a school corporation for the payment of costs attributable to transportation." Ind. Code § 20-40-6-5. "Costs attributable to transportation" include the following:

- (1) The salaries paid to bus drivers, transportation supervisors, mechanics and garage employees, clerks, and other transportation related employees.
- (2) Contracted transportation service.
- (3) Wages of independent contractors.

- (4) Contracts with common carriers.
- (5) Student fares.
- (6) Transportation related insurance.
- (7) Other expenses of operating the school corporation's transportation service, including gasoline, lubricants, tires, repairs, contracted repairs, parts, supplies, equipment, and other related expenses.
- (8) Percentages or parts of salaries of teaching personnel or principals are not attributable to transportation. However, parts of salaries of instructional aides who are assigned to assist with the school transportation program are attributable to transportation. The costs described in this subsection (other than instructional aide costs) may not be budgeted for payment or paid from the fund.
- (9) Costs for a calendar year are those costs attributable to transportation for students during the school year ending in the calendar year.

Ind. Code § 20-40-6-1, Ind. Code § 20-40-6-6. School corporations are authorized to "levy for a calendar year a property tax for the [school transportation] fund sufficient to pay all operating costs attributable to transportation." Ind. Code § 20-46-4-5, Ind. Code § 20-40-6-3. Although the School Transportation Fund includes property tax collections, it can also include "receipts available for school transportation from any other revenue source." Ind. Code § 20-40-6-7. "Other revenue source" is not otherwise defined. Notwithstanding, there is no statutory authority that specifically authorizes the assessment and collection of a school bus rider fee by public school corporations.

CONCLUSION

The legislature has identified transportation of school children as a part of what would constitute a uniform system of public education in Indiana. The governing body of a school corporation is required to provide transportation under some circumstances and authorized to provide transportation for its students otherwise. The school corporation is required to establish a School Transportation Fund. The legislature has indicated what costs are attributable to transportation and has made provision for the funding of the School Transportation Fund. The School Transportation Fund is the exclusive means for the payment of costs attributable to transportation. The legislature has not provided the governing body of a school corporation with the specific authority to assess, charge, or collect a school bus rider fee from the students of the school corporation. Transportation of students to and from their respective public schools are deemed a "part of a public education." Accordingly, per *Nagy*, the school bus rider fee is unconstitutional under Art. 8, § 1 of the Indiana Constitution.

Sincerely,

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Attorney General

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¹ See, e.g., *The School Administrator and Uniform Compliance Guidelines*, Vol. 150 (June 2000) at p. 4, available at <http://www.in.gov/sboa/files/scad600.pdf>.

² The opinion can be accessed at <http://www.in.gov/attorneygeneral/legal/advisory/pub/2001/2001-04.pdf>.

³ "Black's Law Dictionary defines tuition as 'The act or business of teaching the various branches of learning.' *Webster's Third New International Dictionary* adds, '...the act of teaching; the services or guidance of a teacher; ...the price of or payment for instruction.'" *Chandler*, 312 N.E.2d at 920.

⁴ "Better accommodation" is still employed in determining transfers of public school students. See Ind. Code § 20-26-11-5 and 511 Ind. Admin. Code 1-6-3. "Proximity" is no longer a consideration under "better accommodation."

⁵ Acts 1901, § 1, p. 448.

⁶ Acts 1907, § 2, p. 444.

⁷ Acts 1917, § 1, p. 130.

⁸ Acts 1921, § 3, p. 743.

⁹ *Id.* at § 2.

¹⁰ Acts 1945, § 1, p.242. The requirement to transport high school students to a contiguous school corporation where there is no high school in the school corporation of legal settlement is presently found at Ind. Code § 20-27-11-3, as referenced *infra*.

¹¹ "The school corporation or charter school may use any funds otherwise allowable under state and federal law, including the school corporation's general fund, any funds available to the charter school, or *voluntary parent fees*, to provide full day kindergarten programs." (Emphasis added.)

¹² The referenced statutory provisions are part of legislative enactments from 1974 now found at Ind. Code §

20-26-11-19 through Ind. Code § 20-26-11-29. These statutes do not apply to the interdistrict transfers that are part of the Marion County desegregation order. Because the State was found liable for the segregation that occurred in Marion County, the cost for the interdistrict transfers was assessed only against the State. These costs include transportation both for regular school attendance and extracurricular activities. See *United States of America, et al. v. Board of Commissioners of the City of Indianapolis, et al.*, 677 F.2d 1185 (7th Cir. 1982). Accordingly, the General Assembly appropriates funds to implement the "Marion County Desegregation Court Order." The current allocation is \$18 million per fiscal year. See P.L.182-2009(ss), Sec. 9.

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